BRIEF IN SUPPORT OF THE PETITION.

OPINIONS OF THE COURTS.

The opinion of the United States District Court for the Eastern District of Pennsylvania by Kalodner, J., is reported in 56 Fed. Supp. 862.

The Circuit Court of Appeals for the Third Circuit affirmed in a per curiam decision (No. 8763, October Term 1944) not yet reported.

STATUTES INVOLVED.

This cause involves the Act of Congress of October 14, 1940, c. 862, 54 Stat. 1125 as amended, 42 U.S.C. 1521 et seq; the relevant provisions of which are set forth in the appendix hereto.

Also involved herein is the Act of Assembly of the Commonwealth of Pennsylvania of June 7, 1911, Pamphlet Laws 1911, 680, 53 Purdon's Statutes 4071 et seq; and the Ordinance of the City of Philadelphia approved August 31, 1937 (page 433 Ordinances 1937) passed pursuant to an Act of Assembly of the Commonwealth of Pennsylvania approved April 14, 1937, Pamphlet Laws 313, 53 Purdon's Statutes 2224 et seq.

JURISDICTION.

Jurisdiction is invoked pursuant to Section 347 of Title 28 U.S.C. as more particularly set forth in the foregoing petition.

STATEMENT OF THE CASE.

The Summary Statement in the foregoing petition contains all material facts.

The questions of law to be considered are therein set forth as "Reasons Relied on for Allowance of the Writ," and will herein be discussed.

ARGUMENT.

(a) Local building laws are enacted under the police power of the State, and all permanent structures intended for private habitation must be erected in compliance therewith.

The Commonwealth of Pennsylvania and its political subdivision, the City of Philadelphia, in order to safeguard the health and lives of their citizens, have enacted certain laws and ordinances regulating in detail the structural erection of, and plumbing installation in, buildings intended for human habitation within their respective jurisdictions. These laws and ordinances constitute an exercise of the police power which was expressly reserved to the several states by the 10th Amendment to the Federal Constitution: PENN DAIRIES v. MILK CONTROL COMMISSION, 318 U. S. 261, 87 L. ed. 749. Notwithstanding the unquestioned right of the State to regulate such buildings, the Federal Housing Administrator in carrying out the Federal program for providing additional housing for persons employed by industries engaged in manufacture of war materials, completely ignored various material provisions of said laws

and ordinances, and proceeded to erect permanent dwelling units in direct violation thereof.[1]

At the hearing of this case in the District Court it was admitted on behalf of the Government that the dwelling units here involved were intended to be permanent structures,[2] and under the provisions of the Lanham Act, ultimately to be sold to private individuals following the conclusion of the pesent national emergency.[3] The Constitution forbids inequality in the protection of the state laws to all persons within its jurisdiction, and a resident who occupies living quarters erected within this Commonwealth by the Federal Government is entitled to the same guarantees as one who resides in a dwelling erected by private persons in conformity with local laws. This is the clear import of the 14th Amendment to the Federal Constitution which guarantees to every person within a state the equal protection of the laws thereof, and when these dwelling units constructed as they have been, in violation of the local laws, are sold to private citizens for their occupancy, the incongruous situation will be created whereby the City of Philadelphia will be required either to enjoin the occupancy of those dwellings for human habitation or to permit such occupancy contrary to the local laws and to the provision of the Federal Constitution above referred to.

The present case involves more than the mere right of the Government to erect housing in furtherance of its prosecution of a war. The buildings here involved are permanent in kind and nature, erected under the provisions of the Lanham Act which authorized their construction, and are to be sold to the public, and to remain as additions to the local housing facilities. Hence it is clear that those buildings serve a dual purpose, one in furtherance of the Government's present war efforts, the other as a peace-

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[1] See Appellant's Appendix in Circuit Court of Appeals 47a.
[2] See Appellant's Appendix in Circuit Court of Appeals 50a.
[3] Lanham Act, 42 U. S. C. Sec. 1524.

time measure wholly disassociated with its prosecution of war.

We therefore submit that the decision of the lower court is clearly erroneous in that it emphasizes only one phase of these structures and completely ignores the other. When in the Lanham Act Congress declared as the ultimate purpose of these housing projects that they be conveyed to private individuals for dwelling purposes, the federal agency in proceeding under that act was charged with the necessity of building houses in conformity with local laws and regulations in order that in the disposition of these houses to private individuals and parties, such sales may be properly made, and the purchasers may lawfully be permitted to occupy and maintain them.

Even if it be assumed that the Federal Government by virtue of its war powers was authorized to erect the houses in question in disregard of local building and sanitation laws, it is manifest that the power to own and maintain houses so constructed cannot be conferred upon individuals. And the necessary result of building permanent houses with the express intention of ultimately disposing of same to private parties for their individual use, is to authorize the purchasers thereof to maintain and occupy such houses in violation of the local laws although the other residents of that community are required to comply with those laws.

This vital factor in the instant case appears to have been entirely overlooked by the Circuit Court of Appeals, which in its opinion said:

> "The fact that the buildings here were permanent and not temporary structures furnishes no adequate ground for distinguishing the case from the one before this court in United States of America v. City of Chester."

As an informative precedent of the Federal Government's regard for local laws in the construction of permanent housing, we respectfully invite the Court's attention to the construction by the Government, through the Emergency Fleet Corporation, of the large number of dwellings

in the City of Philadelphia during the first world war of 1917-18. As in the instant case, those houses were intended to be sold and disposed of to private parties and persons, and in fact were erected in full accord and compliance with the local building and sanitary laws. On the other hand it appears that in the prosecution of the present war the Federal Government erected dwelling units in the City of Portland, Maine, which were recently the scene of a disastrous conflagration, attributable in a large degree to the fact that the buildings had been erected below the standard of the requirements of the local building laws and regulations, and in violation thereof.

(b) The erection by the Federal Government of permanent dwelling units ultimately intended for use and occupancy by private individuals, must be in compliance with the local building and sanitation laws.

The use of the buildings here involved in furtherance of the war effort constitutes only a part of the declared purpose of Congress in the Lanham Act which authorized their construction. These buildings, admittedly being permanent structures, differ fundamentally from those involved in the case of the United States v. City of Chester. The buildings there involved were intended solely for use during the war emergency. Upon the conclusion of the war they will no longer be used for habitation.[4] However, as respects the buildings involved in the instant case, Congress has directed that they be sold for private use. When that provision becomes effective, immediately the status of those buildings shall have been altered from a project directly connected with the prosecution of the war to a purely peacetime objective, namely that of erecting buildings to become a part of the dwelling facility of the City of Philadelphia. While the war purpose may have been the immediate one

[4] Lanham Act.

which Congress envisioned, the Lanham Act does not define any such distinction between that purpose, and that of the ultimate disposition of said buildings to private individuals in no wise connected with the war effort, as to indicate that one purpose is paramount or superior to the other.

From the very fact that Congress has declared its intention to sell these structures to private owners, the conclusion is inevitable that they must be erected in conformity with the local laws in order that they be inhabitable by private persons. It is inconceivable that Congress could have intended to sanction the sale of housing units which could not be occupied without the violation of local law, and in defiance of the provisions of the 14th Amendment guaranteeing to all inhabitants of the State the equal protection of its laws.

(c) An expression in an Act of Congress of an intent to sell housing facilities to private individuals necessarily involves a mandate that such facilities conform to the standards of health and safety established by the local law.

The lower courts appear to have relied upon two sections of the Lanham Act in support of their decisions, namely 1521 (b) and 1548.[5]

Upon examination of the first of these, it will be noted that Federal, State and Municipal laws, ordinances, rules or regulations which may be disregarded are expressly limited to a class. The Act first refers to Section 1339 of Title 10, which is an Act regulating the construction of permanent barracks, quarters and buildings for the Army, and provides that detailed estimates must first be submitted to Congress for approval. The second law which may be disregarded is Section 5 of Title 41, which is an

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[5] Appendix, pages 19, 22.

Act regulating advertising in connection with contracts for furnishing supplies and services to the Federal Government; and the third Act which may be disregarded is Section 40A of Title 40, now numbered Section 278 (a) of Title 40, which regulates maximum rentals of buildings leased to the Government.

Under the doctrine of "ejusdem generis", general words following specific words are limited to the same class as the specific group: PHEZ CO. v. UNITED STATES, 25 Fed. (2d) 1011, 1012; ALABAMA POWER CO. v. GULF POWER CO., 283 Fed. 606, 619. Thus it necessarily follows that the Federal, State and Municipal laws, ordinances, rules or regulations relating to plans and specifications or forms of contract, the approval thereof or the submission of estimates therefor, is limited in its application to regulations similar to those contained in the specific Acts of Congress recited.

It is evident that what Congress intended was the avoidance of such formal requirements as would result in delay in awarding contracts during the period of national emergency. There is nothing in the language of this section which can reasonably give rise to the conclusion that Congress intended to set aside all building, housing and sanitation laws in effect in the localities in which such housing projects might be erected. There is no legislative intent disclosed to change the type of housing from the purpose expressly declared in the Act, namely, of supplementing homes which ordinarily are built by private capital. In that view the provisions of the Lanham Act are entirely consistent, and do not indicate any conflict between Federal purpose and local police regulations. Especially is this true when, as in the instant case, the construction program involves permanent buildings intended to be continued in existence after the passing of the present emergency, and to become integrated into the general housing facilities of the City of Philadelphia.

Section 1548 of the Lanham Act[6] nowhere expressly states or even gives rise to the implication that standards established by the Administrator shall supersede local statutes, ordinances and regulations. This provision seems to be similar in purpose to the provisions contained in the Low Rent Housing Act (42 U.S.C. 1408) which vests in the Authority power from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of that Act.

The manifest intention of Congress was that the Administrator should establish minimum standards, which would be effective in those districts where local standards might be deemed insufficient. Clearly there is no Congressional purpose expressed in the Act or implied therein to substitute the plans of the Administrator for the standards established by State statutes and Municipal ordinances.

We submit that any other interpretation of this section would involve an unconstitutional delegation of legislative power. The enactment of such regulations, if intended to supplant, rather than supplement, existing State law, is a legislative function which cannot be exercised by a purely administrative official. See: SCHECHTER v. UNITED STATES, 295 U. S. 495, 531, 79 L. ed. 1570, 1580, 55 Sup. Ct. 837; CARTER v. CARTER COAL CO., 296 U. S. 238, 311, 80 L. ed. 1160, 1189, 56 Sup. Ct. 853. The Lanham Act establishes no standards, restrictions or limitations to be observed by the Administrator, except that said regulations be "reasonable", a term too broad and flexible to be regarded as a fixed standard.

Section 1521 of that Act[7] sets forth in the introductory paragraph the objective sought by the Act. It is noteworthy that the statement of the purpose thereof clearly indicates that Federal action is intended only to supplement housing provided by private capital, and there is no suggestion of any intent that Federally built houses shall differ

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[6] Appendix, page 22.

[7] Appendix, page 19.

in any respect from those built privately and in compliance with the State law.

Section 1545 of the Lanham Act[8] provides for consultation with local public officers in order that the housing to be erected shall so far as may be practicable, conform in location and design to local planning and tradition. The legislative history of the above provision indicates an explicit purpose on the part of Congress that that provision shall apply to housing intended to become a permanent part of the housing facilities of the community as is the situation in the instant case.[9] It is manifest that the provisions of the Lanham Act above referred to (42 U.S.C. 1545) are mandatory. At the hearing in the instant case no evidence whatever was adduced to the effect that such consultations had taken place. The announcement of an intention to erect a project is manifestly not consultation; the latter word connotes the filing of plans, discussion, consideration of various modifications, and ultimate agreement among the parties respecting the plans of, and the manner of proceeding with, the construction.

Section 1547 of the Lanham Act[10] reserves to the States and their municipal subdivisions, civil and criminal jurisdiction over these housing projects. Congress thereby expressly included the preservation of the jurisdiction of the State over property and necessarily must have intended that building and housing and sanitation laws relating to the use of property were thus reserved to the States and their political subdivisions. See: PENN DAIRIES v. MILK CONTROL COMMISSION, 318 U. S. 261, 280, 281, 87 L. ed. 749.

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[8] Appendix, page 22.

[9] House Hearing before the Appropriation Committee on H. Res. 258 (Public 371, 77th Congress) p. 9.
Hearings before House Committee on Public Buildings and Grounds on N. H. 6482 and 6483 (Public Law 522, 77th Cong.) Jan. 30, 1942, p. 95.
Hearings before the House Committee on Public Buildings and Grounds on H. R. 732 (Pub. Law 723, 77th Cong.) June, 1942, p. 166.

[10] Appendix, page 22.

(d) The supremacy clause of the Constitution does not empower an administrative officer of a Federal housing agency to ignore local regulations regarding structural safety and sanitation of dwelling units, in the absence of express Congressional authorization to that effect. Such authorization is not contained in the Lanham Act and cannot be supplied by implication.

On behalf of the Federal Government this case was submitted to the District Court on the bald proposition that said Government need not offer evidence of any necessity or compelling circumstances necessitating the violation by it in the construction of the building here involved of local building and sanitation laws.[11] The offer by the City of Philadelphia to establish by evidence that the local laws were generally complied with by private builders during the emergency period was denied by the ruling of the Court excluding such evidence.[12] Hence for the lower court to base its decision upon the doctrine of necessity is contrary to the facts, and not supported by any evidence whatsoever adduced at the trial.

If the decision of the lower court be held to be correct, it would follow that a Federal administrative officer may arrogate to himself the sole right to determine whether or not he will comply with various salutary provisions of local building and sanitation laws which are applicable to all housing facilities in the community. If he elects not to comply therewith, he thereby deprives the owners and occupants of such facilities and the community in general of their right to the equal protection and divers safeguards to their health and welfare, on a par with the other citizens and residents of the same community occupying other housing facilities.

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[11] See Appellant's Appendix page 25a, USCCA 3d Circuit, Oct. Term, 1944, No. 8763.

[12] See Appellant's Appendix in U.S.C.C.A. pages 35a-36a.

CONCLUSION.

It is with serious concern that we survey the opinions of the District and Circuit Courts in the instant case, because of their far-reaching effect and because they intimately involve the health and welfare of the community. While we may be reconciled to the fact that during the period of the war plumbing, heating, yard space, foundation walls, fire protection and other factors entering into the construction of temporary dwellings, be sub-standard in divers respects, our concern is allayed somewhat in the thought that immediately upon the termination of the war such structures will be demolished and those unsafe and unsanitary features in our housing facilities will be eliminated. For that reason we can accept, at least as practicable, the decision in United States of America v. City of Chester, the housing facilities there involved being of such temporary nature.

In the instant case, however, with all due deference, we submit that the lower court failed entirely to comprehend and give expression in its opinion to the gravity of the situation confronted by the City of Philadelphia and its inhabitants as respects the ultimate use of the housing facilities involved herein. These facilities are constructed, insofar as local laws are concerned, in a sub-standard manner as respects material, facilities, spacing and safeguards against health and fire hazards, to such a degree as to create sub-standard houses of the very kind that local communities and the Federal Government itself has in recent years by legislative enactments endeavored to remove from all communities throughout the United States.

Aside from the undesirable low standards of housing facilities thus created, when the Federal Government, upon the termination of the present emergency, proceeds to sell these buildings to private parties, the purchasers will be confronted with the dilemma of the ownership of buildings

constructed contrary to the local laws and which they are forbidden to occupy. And if for some unknown and unforeseen reason or other the purchasers should be permitted to use said buildings for habitation purposes, the situation created would constitute an inequality in the enforcement of the law, in contravention to the 14th Amendment of the Federal Constitution guaranteeing equal protection of the laws to all the inhabitants of the several states.

The likelihood of a conclusion of the present war emergency in the not too far distant future should in no degree affect the legal position of the petitioners-defendants herein. The Federal Government will probably hereafter erect dwelling units not only under its war powers, but under other of its delegated constitutional powers, and whether or not local laws and regulations are applicable and enforceable in such projects will inevitably come into question. We submit that the widespread importance thereof warrants its consideration in the instant case, especially in view of the fact that no ruling by your Honorable Court upon this vital issue appears in the reported cases.

Respectfully submitted,

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